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MISCELLANY.

THE INTEREST OF THE BENEFICIARY OF A LIFE INSURANCE POLICY.—The prevailing idea that the beneficiary named in a life insurance policy has in some way a vested interest appears to have had its origin in what would seem a somewhat strained interpretation of the statutes which provide that on the death of the insured the insurance money shall go to the beneficiaries named in the policy, to the exclusion of the creditors of the insured. *Connecticut Insurance Co. v. Burroughs*, 34 Conn. 305. The later authorities, however, apparently prefer to interpret the taking out of the policy in the beneficiary's name as a declaration of trust, but usually allow the beneficiary to proceed at law on the policy. *Pingree v. National Insurance Co.*, 144 Mass. 574.

A recent case illustrates the indifference of some courts as to the basis of the rule. *Jackson Bank v. Williams*, 26 So. Rep. 965 (Miss.). The plaintiff was the beneficiary named in a policy of insurance on her husband's life. The husband pledged this policy with the defendants as security for a loan. The court said that if the plaintiff did not have a vested right at common law, one was given by the statute regulating the distribution of the proceeds on the death of the insured, and held that without repayment of the loan the plaintiff could recover the policy in replevin. Neither of the views generally advanced to explain the decisions on this subject can be considered satisfactory. The insured never intended to become a trustee. The transaction was merely a unilateral contract by which the insurance company agreed to pay a certain amount to the beneficiary on a contingency happening. 1 Harvard Law Review, 157. It is also never denied that the insured has a perfect right to put an end to the *res* at any time by the non-payment of the premiums, which is hardly consistent with a trust relation. Nor do the statutes afford a more satisfactory explanation, for, apart from their evident relation only to the proceeds of the policy, after the death of the insured, the same result has been reached as easily in their absence as in their presence. *Central Bank v. Hume*, 128 U. S. 195; *Robinson v. Accident Association*, 68 Fed. Rep. 825 (Cir. Ct., Mo.). The absence of any clearly understood principle is forcibly brought out by the decisions that the beneficiary named in mutual benefit certificates has no vested interest, though there would seem in this respect to be no sound distinction between these and the ordinary policies. *Supreme Conclave v. Capella*, 41 Fed. Rep. 1 (Cir. Ct., Mich.). The authorities are also about evenly divided as to whether, in the event of the beneficiary predeceasing the insured, the latter would not obtain full control over the disposition of the policy, which of course is inconsistent with the beneficiary having an absolute and vested interest.

A possible justification for the decisions giving the beneficiary a vested interest might be found in that, strictly, the personal representatives of the insured in an action for a breach of the contract in the policy would only be entitled to nominal damages, and to prevent this failure of justice the beneficiary should be allowed to enforce specific performance of the contract. While the proper remedy would

be in equity, the courts might well allow him to proceed at law on the same grounds on which replevin has been held to lie against a fraudulent vendee. This line of reasoning derives some support from the fact that in England, where the beneficiary of a simple contract is not allowed to sue on the contract, the beneficiary of an insurance policy has been held, in a case where the English statute did not apply, to have no rights whatever, whether legal or equitable, in the contract made by the insurance company with the insured. *Cleaver v. Mutual Insurance Co.* [1892], 1 Q. B. 147. While here, where the contrary doctrine generally prevails, the court in a recent case declared the rule that the beneficiary has a vested interest to be founded on "the well-known principle of the law of contracts." *N. Y. Insurance Co. v. Ireland*, 17 S. W. Rep. 617 (Tex. Sup. Ct.).—*Harvard Law Review*.

QUESTIONS OF LAW AND FACT IN LOCAL ASSESSMENTS. — A writer in the *Harvard Law Review* insists that the decision of the United States Supreme Court in *Norwood v. Baker*, 172 U. S. 269, 43 L. ed. 443, cannot be supported either on principle or by precedent. The precedents certainly are not harmonious, but on the question of the necessity of special benefits to sustain a special assessment for a local public improvement the clear majority of the decisions by State courts (as shown in a note in 14 L. R. A. 755) declare that such assessments can be constitutional only when the improvements confer special benefits on the property assessed. The case of *Norwood v. Baker* is, on this point, in full harmony with the majority of the precedents in State courts. If the prior decision of the United States Supreme Court in *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616, conflicts with these decisions, by necessary implication, when all the facts are considered, it is certain that the court did not fairly decide or discuss the necessity of basing assessments upon the principle of special benefits. A contention that "part" of the property assessed was not benefited was dismissed by the court as "a matter of detail" with which that court could not interfere. This seems to treat the question as one of fact that had already been conclusively settled by the State tribunals. There is, at least, nothing in the opinion to indicate that the court was attempting to decide, as a question of law or a general principle, that local assessments can be made arbitrarily without any relation to the existence of benefits. The same is true as to the other cases in which that court has refused to interfere with local assessments. In the case of *Norwood v. Baker* the court seems for the first time to have fairly grappled with the question of the necessity of basing such assessments on the principle of benefits.

As a matter of fact it is, of course, true that an assessment which purports to be, but is not in reality, based on benefits may be conclusive when the tribunal which has power to decide the matter has found as a fact that benefits are conferred. Such a case is like the conviction of an innocent man by reason of a mistaken decision on the facts, which, though wrong, is conclusive. The fallibility of jurors or other triers of fact makes it possible for great wrongs to be remediless, but each instance of this kind stands alone. There is a clear distinction between determining the existence of benefits as a fact, whether the finding is erroneous or not, and an arbitrary assumption, without any pretense of an actual determination. A wrong decision may be irremediable because the tribunal which must decide the

matter has passed final judgment. But, if the tribunal is by law required to act on an arbitrary rule for special assessments, which entirely disregards the question of benefits, the proceedings are wrong and invalid on their face and as matter of law. A sanction by the courts of a rule or principle which is itself unconstitutional and establishes injustice as law would be unspeakably evil.

The substantial justice of the decision in *Norwood v. Baker* is hardly debatable. The theory that local officials have constitutional power to impose such arbitrary burdens on property owners, even to the extent of a complete confiscation of their property, has indeed had support in a few judicial decisions. But it would be a lasting and biting reproach to our judiciary if they were to sanction so gross an outrage on constitutional rights.

The distinction between taxation and the exercise of eminent domain has often been discussed, and courts have sometimes declared that the constitutional provision against taking property for public use without just compensation has no application to taxation. But, when a man's property is actually taken from him without any compensation whatever to pay for a street improvement which was assessed upon him arbitrarily, without any pretense that he was benefited by it, the case is within the exact terms of the Constitution, and can be excluded from its operation only by limiting the natural meaning of its language, and that, too, in the interest of rank injustice.

When the property is literally taken without any compensation for the benefit of the public, and this is done arbitrarily, it is immaterial whether the outrage is called a tax or something else. Courts may properly hold that an actual exercise of the power of taxation is not within the provision as to taking property without compensation, but this does not require them to hold that a mere arbitrary imposition of an assessment not based on any principle of justice, and by which property is actually confiscated, is outside of the protection of that constitutional provision, and of the provision as to due process of law. A New York statute imposing all the State taxes on Cornelius Vanderbilt could hardly stand as an exercise of the taxing power, even if condemned by no other constitutional guaranties except those against taking property without due process of law or taking it for public use without compensation. The decision in *Norwood v. Baker* gives a rational and natural interpretation to the provisions of the Constitution, while it also stands as a barrier against confiscation under sanction of law.—*Case and Comment.*

DISQUALIFICATION OF JUDGE BY INTEREST—AFFINITY.—*State v. Wall*, 26 (Fla.) So. 1020 (1900). The Supreme Court of Florida has just decided that a man is related by affinity to the husband of his wife's niece. There is a statute in force in that State providing that no person shall sit as judge in any case where he is related to either of the parties whether by consanguinity or affinity. In the present case, the judge, being the husband of the complainant's wife's aunt, had refused to preside at the trial. This was an action to compel him to do so. The Supreme Court sustained him in his refusal.

In Anderson's Dictionary of Law, "affinity" is defined as "the connection which arises from marriage between the husband and the *blood-relatives* of the wife, and between the wife and the *blood-relatives* of the husband." It would appear that there was no affinity between the judge and the complainant. There is no

blood-relationship between his wife and the niece's husband—there is no common ancestor from whom they can trace their descent. The Florida Court gets around this difficulty by taking it that husband and wife are one, in law, and since she is related by affinity to the niece's husband, he is also. See *Kelly v. Neely*, 12 Ark. 657 (1852).

There is a *dictum* of Chancellor Walworth in the case of *Paddock v. Wells*, 2 Barb. (Chancery) 331 (1847), in which he states that relationship by affinity may also exist between the husband and one who is connected by marriage with a blood-relative of the wife. He gives as an example the marriage of two strangers to sisters, and states that they are related in the second degree of affinity just as the sisters are in the second degree of consanguinity.

His statements, however, were entirely unnecessary, as the party in question was the first cousin of a former husband of the defendant, issue of which marriage were still surviving.

There was likewise clearly affinity in the other New York case of *R. R. v. Schuyler*, 28 How. Pr. 187 (1855).

It may be safely said that the question is an open one in the majority of the States. It is well settled that a man's brother is not related by affinity to those to whom he is so related; *Rank v. Shewey*, 4 Watts 218 (1835); *Chase v. Jennings*, 38 Me. 44 (1854); *Bigelow v. Sprague*, 140 Mass. 425 (1886). In these States the question in the present case has not been raised.

Some authorities consider that these cases show a tendency to oppose the Florida doctrine if the case should arise. But there seems to be nothing to lead to this conclusion. If these cases had been tried in Florida, the same decision would have been rendered.

There are, however, many cases which flatly contradict the present decision. *Hume v. Bank*, 10 Lea (Tenn.) 1 (1882), following *Moses v. State*, 11 Humph. 232 (1850), holds that it is impossible to apply the rule contended for that husband and wife are to such an extent one as to make her relations by affinity his. If there is any such rule, the wife's existence is merged in that of the husband, which would defeat the contention that the husband stands in the place of the wife: *O'Neal v. State*, 47 Ga. 229 (1872).

The case of *Chinn v. State*, 47 Ohio St. 575 (1890), is in direct conflict with Chancellor Walworth's *dictum*, above referred to. There it was held that a man and his wife's brother's wife were not related by affinity. Likewise Christian, in his note to I Blackstone, 435, declared that even where by the law it is unlawful to marry one related by affinity, a man may marry his wife's brother's wife, the circumstances permitting.

Possibly the most recent case holding the view opposite to *State v. Wall* is *Tegarden v. Phillips*, 42 N. E. (Ind.) 549 (1895), which is exactly parallel to the present case. In this case the judge admits that a line of affinity extends from the husband to the wife's blood and *vice versa*; but he denies that new blood can be introduced by the marriage of the affinity relatives of either.

The great question seems to be, are husband and wife one person, or are they for the present purposes united by the strongest kind of an affinity, which would, however, prevent any relationship between the husband and the wife's affinity relatives.—*American Law Register*.